UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF JULIO MIGUEL ORLANDINI-AGREDA AND COMPAÑÍA MINERA ORLANDINI LTDA. FOR AN ORDER DIRECTING DISCOVERY FROM GIBSON, DUNN & CRUTCHER LLP PURSUANT TO 28 U.S.C. § 1782

Misc. Action No. ____________

DECLARATION OF DAVID M. ORTA IN SUPPORT OF PETITION FOR DISCOVERY IN AID OF A FOREIGN PROCEEDING PURSUANT TO 28 U.S.C. § 1782

Pursuant to 28 U.S.C. § 1746, I, David M. Orta, hereby declare under penalty of perjury that the following is true and correct:

1. I am a partner in the law firm of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), which represents Petitioners Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. in connection with the Petition and also in connection with a forthcoming international investment treaty arbitration against the Plurinational State of Bolivia ("Bolivia"). I submit this declaration in support of the Petition for Discovery in Aid of a Foreign Proceeding Pursuant to 28 U.S.C. § 1782. True and correct copies and translations of all exhibits cited below are attached to this declaration.

The Parties

2. Julio Miguel Orlandini-Agreda is a U.S. citizen residing in Miami, Florida. He is one of the claimants in the forthcoming arbitration against Bolivia.

3. Compañía Minera Orlandini Ltda. ("CMO") is a mining company organized and existing under the laws of Bolivia. Mr. Orlandini is the majority owner of CMO.

4. Gibson, Dunn & Crutcher LLP ("Gibson Dunn") is found and resides in this district. Gibson Dunn's New York office is located at 200 Park Avenue, New York, New York 10166.

5. As will be explained further below, Gibson Dunn represented the sellers of Compañía Minera del Sur S.A. ("COMSUR") in the sale of the company to Glencore International AG ("Glencore") in late 2004 or early 2005.

Background

6. CMO was formed in 1964 as a mining company and acquired over forty mining concessions in Bolivia. Two of those concessions were located in Municipality of "Antequera" and the rest were in an area called "Totoral" located in the Municipality of Pazña.

7. CMO's two concessions in Antequera were named Veneros San Juan and Pretoria. *See* Ex. A, Map of Concessions. These concessions were surrounded to the north and south by concessions called the "Bolívar mine concessions," which belonged to Corporación Minera de Bolivia ("COMIBOL"), Bolivia's state-owned mining company. *See id.* COMIBOL's concessions were operated by COMSUR as COMIBOL's partner in a public-private joint venture from 1993 to 2005. *See* Ex. B, p. 7, COMIBOL Letter (January 10, 2001).

8. In 1997, COMIBOL applied for and was granted a new concession named "Seguridad I." The Seguridad I concession overlaid CMO's pre-existing mining concessions Veneros San Juan and Pretoria. Its purpose, according to COMIBOL, was to secure the joint venture's mining operations in the area. *See* Ex. B, p. 7. At COMSUR's behest, the Seguridad I concession was formally incorporated as part of the Bolivar mine concessions in 2001 through an

addendum to the joint venture agreement between COMIBOL and COMSUR. *See* Ex. B, p. 1, COMIBOL Resolution (Aug. 21, 2001).

9. Under Bolivian law, pre-existing concessions enjoy exclusive priority over later-granted concessions. *See* Bolivian Mining Code of 1997, Article 33. Therefore, a concession holder who is granted a new mining concession must fully respect pre-existing mining rights to the extent of any overlap. New concessions cannot and do not erase the pre-existing mining rights held by prior concession holders. Thus, CMO's mining rights remained intact notwithstanding the granting of the Seguridad I concession to COMIBOL.

10. In 1999, COMIBOL and COMSUR approached Mr. Orlandini (CMO's principal shareholder) to negotiate an easement through CMO's concessions in Veneros San Juan and Pretoria. They informed CMO that they wanted to build galleries in the depths of CMO's concessions to connect and transport minerals between their concessions to the north and south of CMO's. The negotiations were not successful.

11. CMO later learned that COMIBOL and COMSUR were illegally entering and extracting minerals from CMO's Veneros San Juan and Pretoria concessions. Furthermore, COMSUR illegally utilized CMO's concessions as a right of way through which it transported minerals mined from COMIBOL's concessions without paying a right-of-way charge to CMO. CMO wrote letters, held meetings, and even pursued criminal complaints before the Bolivian courts to stop COMIBOL and COMSUR/Sinchi Wayra from illegally extracting minerals from CMO's concessions. *See* Ex. C, Letter from CMO to COMIBOL (Nov. 25, 2004); Ex. D, Email from Mr. Orlandini to Ms. Grenacher (Apr. 2, 2006). Nevertheless, none of CMO's efforts to stop the illegal incursions and mining—neither with COMIBOL or COMSUR nor before the Bolivian

legal system—were successful. COMIBOL and COMSUR even prevented CMO from accessing its own Veneros San Juan and Pretoria concessions.

12. In late 2004 or early 2005, Glencore acquired COMSUR and, in 2005, changed COMSUR's name to Sinchi Wayra S.A. Ex. E, U.S. Geological Survey, *2005 Minerals Yearbook: Bolivia*, p. 3.3; Ex. F, U.S. Geological Survey, *2004 Minerals Yearbook: Bolivia*, p. 3.5; Ex. G, Jorge Espinoza Morales, *Minería boliviana*, p. 223 (2010). Prior to the sale transaction, COMSUR was owned by Iris Mines & Metals S.A., which in turn was owned by Minera S.A., an international mining holding company founded in 1962 in Panama; and Kempsey S.A. and Shattuck Trading S.A., both companies incorporated in Panama. Ex. H, IFC Disclosure; Ex. I, *Minera S.A.*, KSL MINING. Iris Mines & Metals S.A. held 99.89% of COMSUR's stock, and Kempsey S.A. and Shattuck Trading S.A. owned 0.11%.

13. According to a letter from Blake T. Franklin, then a partner of Gibson Dunn, the sellers of COMSUR were represented by Gibson Dunn primarily through their New York office. *See* Ex. J, Letter from B. Franklin to M. Orlandini (Feb. 5, 2008). Mr. Franklin, writing on the letterhead of Gibson Dunn's New York office, stated that he was "closely involved in all steps" of the sale of COMSUR to Glencore. *Id.* Mr. Franklin did not identify the "sellers" of COMSUR, but public sources widely reported that the seller was Sánchez de Lozada.

14. Sánchez de Lozada sold COMSUR to Glencore by selling his interests in Panamanian holding companies. Prior to the sale to Glencore, Sánchez de Lozada owned and controlled both Minera S.A. and Iris Mines & Metals S.A. Ex. K, *Orígenes Del Gonismo*, GONISMO: DISCURSO Y PODER; Ex. L, *Orvana Announcement* (Mar. 4, 2002). Glencore purchased Iris Mines & Metals S.A. from Minera S.A. and thus became the major shareholder of COMSUR itself at the beginning of 2005. Ex. M, *Orvana Announcement* (Feb. 10, 2005); Ex. N, *Glencore*

advances with Minera Aguilar takeover, BN AMERICAS (Apr. 18, 2005); EX. O, *Una Poderosa Minera Activa de Bolsa*, NUEVAECONOMIA (July 13, 2008). Iris Mines & Metals S.A. now owns 99.89% of Sinchi Wayra. Ex. P, "Patrimonio Autónomo Sinchi Wayra," *Pacific Credit Rating* Report (2017), p. 17. Sometime between 2004 and 2006, Glencore also purchased Kempsey S.A. and Shattuck Trading S.A., which together held a 0.11% interest in COMSUR. After purchasing the three companies, Glencore was the sole owner of COMSUR, which it renamed as Sinchi Wayra S.A., and became the operator of the Bolivar mine concession under COMSUR's existing joint venture agreement with COMIBOL. In 2013, Sinchi Wayra assigned the joint venture agreement to Sociedad Minera Illapa S.A. (another subsidiary of Glencore).

15. After the sale of COMSUR to Glencore, the Bolivian government implemented a series of illegal measures that papered over the illegal mining that COMSUR had conducted and dispossessed CMO of its mining concessions, property, and all attendant rights.

16. Due to these events, CMO has not had access to the Veneros San Juan and Pretoria concessions for many years, and CMO does not have complete data on the minerals that have been extracted from the Veneros San Juan and Pretoria concessions.

The Arbitration

17. Quinn Emanuel is preparing to initiate an international investment treaty arbitration on behalf of Petitioners against Bolivia based on its illegal measures under the bilateral investment treaty between the United States and Bolivia (the "U.S.-Bolivia BIT") in the very near future, and the arbitration therefore is "in reasonable contemplation" and qualifies under Section 1782. Petitioners will be the claimants in the arbitration and thus are "interested persons" under Section 1782.

18. In the arbitration, Petitioners will claim significant damages for governmental actions through which Bolivia has violated its obligations to CMO and Mr. Orlandini, including

the expropriation of CMO's mining concessions and other violations of the U.S.-Bolivia BIT. The arbitration will be governed by the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. Under Article 18 of the UNCITRAL Arbitration Rules, the place of arbitration will be determined by the tribunal, "having regard to the circumstances of the case." Petitioners intend to request that the arbitration be seated outside the United States; and because Mr. Orlandini is a U.S. citizen, Petitioners believe that Bolivia will concur with this request. Specifically, Petitioners intend to suggest Paris, France, a venue to which Bolivia has agreed for other UNCITRAL arbitrations with other investors.

19. The UNCITRAL Arbitration Rules do not prohibit judicial discovery or assistance from courts. Article 27 of the UNCITRAL Arbitration Rules, titled "Evidence," provides that the arbitral tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered." Ex. Q, UNCITRAL Arbitration Rules (2013). In other UNCITRAL arbitrations, tribunals have accepted evidence obtained from court-supervised discovery proceedings such as under Section 1782.

20. Gibson Dunn, and its former clients that owned COMSUR and the other companies sold to Glencore, will not be parties to the arbitration.

21. Once constituted, the arbitral tribunal will not have jurisdiction over Gibson Dunn, or its former clients, and will not have authority to order Gibson Dunn or its former clients to produce documents.

22. There is no indication or reason to believe that the arbitral tribunal, once constituted, would be unreceptive to judicial assistance by Section 1782 discovery.

The Discovery Needed

23. Petitioners need discovery from Gibson Dunn on COMSUR's incursion into CMO's concessions and the amount of minerals that COMSUR and COMIBOL extracted from

CMO's concessions, including under the guise of the Seguridad I concession. Petitioners also seek information on wrongful acts that the sellers of COMSUR disclosed to Glencore during the sale, as well as any other relevant information that Gibson Dunn had in relation to Petitioners' claims against Bolivia. This discovery is for use by Petitioners to assist in proving liability and resulting damages against Bolivia in the arbitration. The draft subpoena filed concurrently with the Petition describes Petitioners' discovery requests in full detail.

24. Petitioners' request for discovery is not intended to, and does not in fact, circumvent any applicable foreign restrictions or policies on the gathering of evidence.

25. Petitioners' request is not unduly burdensome or intrusive. It seeks a discrete set of documents in Gibson Dunn's possession and deposition testimony of Gibson Dunn regarding arrangement of files and document retention and the authentication of documents contained in Gibson Dunn's files.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on September 25, 2017, in Washington, D.C.

David M. Orta